

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JON W. AND ANTOINETTE O. JOHNSTON)

For Appellants: Jon W. Johnston,
in pro. per.

For Respondent: John A. Stilwell, Jr.
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Jon W. and Antoinette O. Johnston against a proposed assessment of additional personal income tax and penalties in the total amount of \$376.50 for the year 1980.

Appeal of Jon W. and Antoinette O. Johnston

The issue presented by this appeal is whether respondent properly imposed penalties pursuant to section 18681 of the Revenue and Taxation Code for appellants' failure to file a tax return on or before the due date, and pursuant to section 18683 of the Revenue and Taxation Code^{1/} for appellants' failure to file a tax return upon notice and demand for 1980.

Respondent was unable to find any personal income tax return filed by appellants for taxable year 1980. Accordingly, on November 16, 1981, respondent informed appellants of its failure to find such return and demanded that any required return be filed within ten days. Appellants did not respond, and on February 1, 1982, respondent issued a notice of proposed assessment based upon information obtained from appellants' employers. In addition, respondent also imposed penalties equal to 25 percent of the estimated tax liability for appellants' failure to file a tax return on or before the due date (section 18681) and for failure to file a tax return upon notice and demand (section 18683).

On March 1, 1982, respondent received a timely protest from appellants consisting of a document appellants allege to be a copy of their original 1980 tax return, signed by appellants and dated April 14, 1981. On that return, appellants report an additional \$70 of tax liability which, to date, has not been paid. Based on the information contained in that return, respondent determined that the section 18681 penalty amounted to \$17.50, while the section 18683 penalty equaled \$289.

Appellants contend that their 1980 return was timely mailed on or about April 14, 1981. Moreover, they contend that they did not receive respondent's November 16, 1981, demand that they file a return. However, that demand was sent to the appellants' last known address, that was the same one to which the proposed assessment was sent and to which appellants responded.

Section 18401 provides that every individual or married couple taxable under the Personal Income Tax Law must file an annual return unless the income of the individual or couple is less than a specified amount. The record on appeal indicates that appellants were required to file a 1980 return under this statute.

^{1/} Hereinafter, all statutory references are to the Revenue and Taxation Code.

Appeal of Jon W. and Antoinette O. Johnston

Section 18681 provides for a 25 percent penalty against any taxpayer who fails to file a return on or before the due date, while section 18683 provides for a 25 percent penalty against any taxpayer who fails or refuses to file a return upon notice and demand by respondent. Of course, these penalties can be abated if such failure is due to reasonable cause and not willful neglect.

The propriety of the penalties presents issues of fact as to which the burden of proof is upon the taxpayer. (Appeal of Thomas S. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974; Appeal of LaSalle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.) Appellants first contend that they, in fact, did mail a return for the year at issue before the due date. However, the only evidence submitted is appellants' self-serving statements. We have held before that where the only proof offered is the taxpayer's self-serving allegation that the return was timely mailed, and the tax authority's records indicate no such return was ever received, there is insufficient evidence to show reasonable cause to negate the imposition of the penalties. (Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977.) Appellants next contend that they did not receive respondent's demand to file a return. However, we have held that where a demand is sent to the last known address of a taxpayer as done in this case, such notice is sufficient to notify the taxpayer of the requirement to file. (Appeal of Winston R. Schwyhart, Cal. St. Bd. of Equal., April 22, 1975.)

Accordingly, we find that appellants have failed to carry their burden of proving either penalty erroneous, and respondent's action must be upheld.

Appeal of Jon W. and Antoinette O. Johnston

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Jon W. and Antoinette O. Johnston against a proposed assessment of additional personal income tax and penalties in the total amount of \$376.50 for the year 1980, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of October 1983, by the State Board of Equalization, with Board Members **Mr. Bennett**, **Mr. Collis**, **Mr. Dronenburg**, **Mr. Nevins** and **Mr. Harvey** present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9